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No. 99-995

In The

Supreme Court of the United States

SMS SYSTEMS MAINTENANCE SERVICES, INC.,

Petitioner,

vs.

DIGITAL EQUIPMENT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

Under the *SMS v. DEC* decision below, an antitrust plaintiff will now be forced to prove its case on summary judgment, and will be left wondering how much evidence of key issues such as lock-in, relevant market, or monopoly power is "enough" to survive summary judgment. Such a burden is inconsistent with *any* of this Court's authority on the subject of summary judgment. *See* SMS's Petition at 13-20. Thus, contrary to DEC's claims, the decision presents critical issues of law worthy of this Court's review.

Moreover, the First Circuit imposed a burden on SMS that it could not possibly have met. Not even undisputed evidence from SMS's experts, DEC's internal files, or DEC's loyal customers was enough to overcome the panel's predisposition that DEC's warranty was good and that SMS would not likely prevail on its "offbeat" claims at trial. The panel's predilection is precisely what this Court has repeatedly cautioned against at the summary judgment phase, and provides a compelling reason for the Court to revisit this important issue.

Finally, in disposing of SMS's "offbeat" claims, the First Circuit also adopted legal standards concerning the core concepts of relevant market and monopoly power which are consistent not with the majority opinion in *Kodak*, but rather with its dissent. For example, the *Kodak* Court held that aftermarkets are to be treated like "every other separate market." *See Eastman Kodak Corp. v. Image Technical Services, Inc.*, 504 U.S. 451, 479, 112 S.Ct. 2072, 2089, 119 L.Ed.2d 265 (1992). Nevertheless, the First Circuit held that aftermarkets are *sui generis*, that "other

modes" of measuring market power in an aftermarket must be employed, and that relevant market definition was unnecessary in this case. *See* App. at 8A and 12A and SMS's Petition at 14-16. Whether considered first, second or last, a relevant market *must* be considered and defined at some point in an antitrust analysis – even when an aftermarket is involved. *Ibid.* Indeed, the *only* statements this Court has made to the contrary are contained in the *Kodak* dissent. *See, e.g., Kodak*, 504 U.S. at 503, 112 S.Ct. at 2101 (majority's reliance on traditional indicia of relevant market or monopoly power – shown by lack of 'readily available substitutes' and Kodak's possession of 80% to 95% of market – was misplaced given primary market competition) (Scalia, J., dissenting). Absent review by this Court, the confusion over these crucial antitrust issues will only increase.

II. ARGUMENT

A. The First Circuit's Opinion Misapplies The Critical Summary Judgment Standards Set Forth By This Court

DEC admits that antitrust claims should be resolved on a case-by-case basis focusing on the facts disclosed by the record. *See* DEC's Opp. at 9. However, DEC misunderstands the court's role in "resolving" those claims on summary judgment. In confirming the need for fact-specific review, the *Kodak* Court did not confer upon a court the unfettered right to resolve disputed issues of fact as the First Circuit did in this case. *See* SMS's Petition at 7-8. Instead, the *Kodak* Court confirmed that a court may *not* make legal presumptions, nor may it grant summary

judgment when it determines that one theory is *more plausible* than another. *Ibid. See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970) (the judge's function on summary judgment is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial)). In addition, this Court has made clear that a court may *not* compel a party to prove the merits of its case in order to survive summary judgment. *Kodak*, 504 U.S. at 486, 112 S.Ct. at 2092 ("In the end, of course, Kodak's arguments may prove to be correct. . . . But we cannot reach these conclusions as a matter of law on a record this sparse.").

DEC myopically disregards the literally dozens of assumptions and credibility determinations underlying the First Circuit's opinion, contending instead that: "SMS has failed to create a genuine issue of material fact on the critical elements of its Section 2 claim." DEC's Opp. at 11. DEC's contention is far from accurate. First, the panel crippled SMS's ability to create *any* disputed issues of fact by presuming that warranties were good, pro-competitive and *per se* lawful. *See, e.g.*, App. at 4A-5A, 32A. This presumption erroneously led to a preference for DEC's defense, and thus, to a dismissal of SMS's "offbeat" claim that DEC's mandatory, three-year service contract has stifled competition. *Kodak*, 504 U.S. at 468, 112 S.Ct. at 2083 (citing *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (summary judgment is not a contest between two competing theories).

Critically, the panel also improperly assessed the credibility of SMS's evidence in determining that SMS failed to offer *enough* evidence of such issues as relevant market, monopoly power, or lock-in. App. at 26A-28A.[1] Under the panel's decision, antitrust litigants are left with the unenviable task of proving their cases on summary judgment, and they are further saddled with the frustrating inability to determine just how much evidence is "enough" to satisfy that burden. The panel's decision thus critically undermines this Court's authority on the subject of summary judgment. *See* SMS's Petition at 13-20. In addition, as confirmed by the antitrust case recently brought by the United States government against Microsoft, the important issues this decision raises are likely to surface again and again in cases involving complex or novel high-technology matters.

Finally, DEC implies that because summary judgment standards have been often addressed by this Court, the misapplication of those standards somehow renders them immune from further scrutiny or review by this Court. DEC's Opp. at 10-12. To the contrary, the First Circuit's blatant misuse of summary judgment only confirms a

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[1] For example, DEC's internal marketing documents confirmed the lock-in phenomenon, and DEC's own customers – deposed by DEC – established that exorbitant switching costs prevented them from switching to another brand of equipment despite their dislike of DEC's mandatory, three-year service warranty. *Ibid.* and SMS's Petition at 11-13. Nevertheless, *as a matter of law,* the panel concluded that uncontradicted testimony from customers regarding their switching costs, purchasing decisions, and 'commercial realities', was insufficient to create a genuine issue of fact regarding lock-in. SMS's Petition at 3-4, 11, and App. at 26A-28A.

critical need for this Court's guidance on the issue; particularly, as here, where the temptation to dispose of complex or novel claims on summary judgment ultimately prevailed. This Court has concentrated on the issue of summary judgment because of its difficulty and its importance, and it is evident that this work is not yet done.

B. The First Circuit Ignored Substantive Antitrust Principles Concerning Monopoly Power In An Aftermarket

DEC also contends that this Court should deny SMS's petition because the First Circuit's opinion is entirely consistent with *Kodak*. DEC's Opp. at 12. The decision below, however, radically diverges from *Kodak* both procedurally and substantively – indeed, it follows the dissent. As noted above, in flat contradiction to *Kodak*, the First Circuit supplanted the role of the jury when it determined that SMS's "offbeat" claims were not as good as DEC's, when it assessed the credibility of undisputed testimony from DEC's own customers *and* DEC's internal marketing documents, and when it assumed that warranties were presumptively good. *Infra* at 2-4.

Substantively, the First Circuit also strayed from *Kodak* in several telling respects. First, it adopted standards for relevant market definition which have been expressly rejected by this Court, but advocated by the dissent in *Kodak*. SMS's Petition at 14-25. In *Kodak*, for example, this Court confirmed that it "has not adopted any exception to the usual analysis, treating derivative aftermarkets as it has every other separate market." *See*

Kodak, 504 U.S. at 479, n. 29, 112 S.Ct. at 2089. Echoing the *Kodak* dissent, however, the First Circuit held that aftermarkets are *sui generis*. *See* App. at 8A and 12A (when considering an aftermarket, "courts cannot reflexively resort to traditional product market definition methods, but must look to other modes of scrutinizing the existence and measure of market power") and *Kodak*, 504 U.S. at 503, 112 S.Ct. at 2101 ("In my view, if the interbrand market is vibrant, it is simply not necessary to enlist § 2's machinery to police a seller's intrabrand restraints.") (Scalia, J., dissenting).

As suggested by the *Kodak* dissent, and in flat contrast to this Court's authority, the panel also failed to define or consider a relevant market in any respect. *Ibid.* and SMS's Petition at 9. This Court has made clear, however, that whether considered first, second or last, a relevant market must be considered and defined at some point in any antitrust analysis. *See* SMS's Petition at 14-16 (citing, *inter alia*, *United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1705, 16 L.Ed.2d 778 (1966) (possession of monopoly power must be evaluated in the context of a properly defined relevant market)). Absent definition of a relevant market, there is simply no way to measure the ability to exclude competition. *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 890, 122 L.Ed.2d 247 (1993).

Moreover, contrary to DEC's claims, the First Circuit also failed to consider DEC's ability to exercise its monopoly power in the service market. *See* DEC's Opp. at 14 and SMS's Petition at 17, n. 4. The panel overlooked undisputed evidence that DEC possessed over 91% of the aftermarket for service of DEC equipment – itself *prima*

facie evidence of monopoly power in an aftermarket under this Court's authority. *See Kodak*, 504 U.S. at 481, 112 S.Ct. at 2090 (citing *Grinnell*, 384 U.S. at 471, 86 S.Ct. at 1704). Echoing the dissent in *Kodak*, both DEC and the First Circuit maligned SMS's market share evidence as "single-minded", and concluded that DEC can be expected to possess such a naturally high market share of the service of its own equipment. *See* App. at 8A-9A, DEC's Opp. at 14, and *Kodak*, 504 U.S. at 503, 112 S.Ct. at 2101 (a showing of 80% to 95% of the service market "could easily be made . . . with respect to virtually any manufacturer of differentiated products requiring aftermarket support") (Scalia, J., dissenting).[2]

The First Circuit also disregarded other evidence that DEC had the ability to raise prices and exclude competition in the service. Such evidence is further proof of monopoly power under *any* standard set forth by this Court; any standard, that is, except for that advocated by the *Kodak* dissent. *See, e.g., Kodak*, 504 U.S. at 503, 112 S.Ct. 2101 (when primary market competition exists, antitrust laws need not police aftermarket restraints) (Scalia, J., dissenting).

Finally, contrary to DEC's claim, the First Circuit *did* base its determination of monopoly power on the "policy change" change requirement first suggested by the *Kodak* dissent. *See* App. at 15A-16A and *Kodak*, 504 U.S. at 492,

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[2] The panel even cited an article to this effect written by the losing attorney in *Kodak*. *See*. App. at 9A (citing Daniel Wall, *Aftermarket Monopoly Five Years After Kodak*, 11 Antitrust 32, 33 (1997) (manufacturers can be expected to have a monopoly share of the market for service of their own product)).

112 S.Ct. at 2095 (had Kodak announced its restrictive parts policy at the time of its market entry, not even the majority would have found monopoly power in the face of primary market competition). (Scalia, J., dissenting). Ironically even if proof of a policy change were required to establish monopoly power, SMS offered uncontradicted proof that DEC changed its warranty policy in 1994 and again in 1995 – *after* a substantial number of customers were already locked in. SMS's Petition at 21. In any event, the legal requirement that a party must establish a change in policy in order to prove monopoly power was *never* adopted, or even addressed, by the *Kodak* majority, and it has generated conflicting and confusing results among the lower courts. *See, e.g., Red Lion Medical Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218 (E.D. Cal. 1999).

III. CONCLUSION

High-technology antitrust litigants are entitled to know whether the majority opinion or the dissenting opinion in *Kodak* is the law of the land. Because the decision below concerns critical issues addressed by both the majority and the dissent in *Kodak*, including the standards for summary judgment to be applied in an antitrust controversy, whether and how a relevant aftermarket should be defined, and the factors necessary to demonstrate monopoly power in an aftermarket, it presents the ideal vehicle for the Court to clarify this issue. Some justices may believe that certiorari is required in this case in order to confirm that the *Kodak* majority is, indeed, the law of the land. Other justices may feel that certiorari is required to reverse *Kodak*, and to adopt not only the

dissent, but the decision made by the panel below. In either event, clarifying the law in this important area requires certiorari review.

Respectfully submitted,

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